81-1615

No.

Office - Supreme Court, U.S.
FILED
FEB 26 1982
ALEXANDER L. STEVAS,
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In The

Supreme Court of the United States

October Term, 1981

IN THE MATTER OF JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

Appellant,

vs.

JOHNS-MANVILLE CORPORATION, et al.,

Appellees.

On Appeal from the
New York Court of Appeals

JURISDICTIONAL STATEMENT

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DATED: February 26, 1982

QUESTION PRESENTED

If New York, and some of the other states, construe their statute of limitations, when applied to latent and inherently unknowable injuries like appellant's asbestos disease, to run from the date of inhalation or exposure and not the date when any possible harm would be discoverable, have they satisfied the minimum due process standards established by this Court that state statutes of limitation: (1) provide a plaintiff with an adequate, bona fide opportunity to commence the action, and (2) are not inconsistent with the common law purposes behind statutes of repose?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW*

The opinion of the New York Court of Appeals, which appears in the Appendix hereto, see *infra* at p. A-1, is reported at 54 N.Y.2d 1008, N.Y.S.2d , N.E. 2d (1981). An

*The full names of all of the appellees are as follows:

Johns-Manville Corporation,
Eagle Picher Industries, Inc.,
Phillip Carey Industries, Inc.,
Owens-Corning Fiberglass Corporation,
Armstrong Cork Company,
Fibreboard Paper Products Corp.,
Combustion Engineering, Inc.,
Pittsburg Corning Corp.,
Unarco Industries, Inc.,
Armstrong Contracting and Supply Corp.,
Standard Asbestos Manufacturing and Insulating Company,
Keene Insulation Company,
Rockwell Manufacturing Company, and
GAF Corporation.

amendment to its remittitur noting its adjudication of the constitutional issues raised below appears in the Appendix, *infra* at p. A-19. This does not yet appear in the official reporter, or in unofficial reporters.

The decision of the intermediate appellate court appears at 78 A.D.2d 577, 432 N.Y.S.2d 422 (4th Dept. 1980). The decision of the Special Term (i.e., motion term) of the Supreme Court, Erie County, New York, appears at 94 Misc.2d 327, 404 N.Y.S.2d 814 (1978). It is reported *sub nom McKee* v. *Johns-Manville Corp.*

JURISDICTION

This suit is one in which the highest court of the State of New York sustained the constitutionality of a state statute, N.Y. CPLR 214(5), as interpreted and applied to this action. The jurisdiction of this court is therefore invoked under 28 U.S.C. §1257(2).

The judgment of the New York Court of Appeals dismissing appellant's complaint was entered on October 29, 1981. *See infra* at p. A-17. A motion to amend the remittitur was made by appellant and granted on December 22, 1981. *See infra* at p. A-19.

A notice of appeal to this court was timely filed in the New York Court of Appeals and with the clerk of the Supreme Court, Erie County, the court then possessed of the record. The notice of appeal was filed on December 10, 1981.

This appeal is being docketed on February 26, 1982, pursuant to an order extending the time within which to docket this appeal granted by the Hon. Justice Thurgood Marshall dated December 28, 1981. See *infra* at p. A-22.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, §1, of the United States Constitution:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

New York CPLR 214(5):

> The following actions must be commenced within three (3) years:
>
> (5) An action to recover damages for a personal injury except as provided in §§214-(b) and 215.

STATEMENT OF THE CASE

(i) *Nature of the Case*

This is an action in negligence and strict products liability against the major manufacturers, suppliers and distributors of asbestos-containing insulation products in the United States. The complaint alleges that each defendant knew for many years of the hazards of inhalation of asbestos dust and particles; that asbestos workers like the late James McKee had no knowledge or appreciation of the severe hazards of asbestos exposure; that rather than inform McKee and his fellow workers of these known dangers, the Johns-Manville Corporation and its co-defendants chose to remain silent. Their silence permitted McKee, like many others, to use their products and inhale asbestos particles in ignorance of the accompanying health risks and without adequate preventive measures against these known and suspected health hazards. The proximate result of this failure to warn was his total and permanent disability from asbestosis and his eventual death from mesothelioma. The

action is now brought by his daughter, Jeanne Steinhardt, as executrix of his estate.

The issue of industry awareness has been litigated and reviewed in reported federal and state decisions. It has been the subject of congressional investigations. The most succinct of these is *Borel* v. *Fiberboard Paper Products*, 493 F.2d 1076, 1083-86, nn.3-16 and accompanying text (5th Cir. 1973); also see, *Hearings on Asbestos Related Occupational Diseases before a Subcommittee of the House Committee on Education and Labor*, 95th Cong. 2d Sess. 1-4, 52-128.

Not everyone who inhales asbestos dust subsequently develops an asbestos disease. If one of these diseases (asbestosis or mesothelioma)[1] does develop, however, "it does not manifest itself until 10 to 25 or more years after initial exposure . . . . By the time the disease is diagnosable a considerable period of time has elapsed since the date of the injurious exposure." *Borel*, 493 F.2d at 1083.

James McKee had been employed in asbestos insulation work from 1939 to 1972. His last occupational exposure to asbestos was in 1970. He retired in 1972 because of respiratory ailments. No diagnosis of asbestos disease was made, nor was possible, until March of 1973 when a positive biopsy was obtained. In 1978 he died of mesothelioma.

From his first hospitalization in 1968 until the diagnosis of asbestosis was made in 1973, his physician could only report —

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[1]The disease of asbestosis is a scarring of the lung tissue, a fibrotic induration where the lung loses its flexibility or pliability — its ability to expand or contract. It hardens and becomes wood-like.

The disease of mesothelioma is medically distinguished from lung cancer. It is a tumerous carcinoma (malignancy) of either the membrane encasing the lung (pleura) or of a similar delicate membrane lining the abdominal cavity (peritoneum). Generally its latency period is 30 years and is nearly always fatal 8-14 months after the cancer first appears.

"I found he had a pulmonary infection . . . he had nothing different from my average patient, who comes in with a pulmonary infection in the City of Buffalo, where there is a lot of pollution."[2] Lung biopsies were entirely negative until the 1973 diagnosis.

This action was commenced in the New York State Supreme Court within three years of that diagnosis. The appellees engaged in pre-trial discovery procedures. Before appellant initiated his discovery activities, appellees moved to dismiss the action as barred by New York's three-year statute of limitations, CPLR 214(5).

New York does not embrace a discovery rule beyond the medical malpractice foreign object context. *See* 7B *McKinney's New York CPLR* 214-a. Negligence and strict products liability actions accrue when the injury occurs and not when it is first discoverable. In this context, appellees urged, the injury occurs at the time of inhalation or exposure. *Schmidt* v. *Merchant's Despatch Transportation Co.*, 270 N.Y. 287, 200 N.E. 824 (1936); *Schwartz* v. *Hayden Chemical Corp.*, 12 N.Y.2d 212, 237 N.Y.S.2d 714, 188 N.E.2d 142, *rem. amended*, 12 N.Y.2d 1073, 239 N.Y.S.2d 896, *cert. denied* 374 U.S. 803 (1963); *Thornton* v. *Roosevelt Hospital*, 47 N.Y.2d 780, 417 N.Y.S.2d 920, 391 N.E.2d 1002 (1979).

In response appellant argued that this interpretation of CPLR 214(5) is an unconstitutional denial of due process of the law in its disregard of long established precedents by this Court which set forth minimum standards of due process fairness applicable to all state statutes of limitations and in the more specific context of latent diseases.

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[2]Examination Before Trial of P. Longstreth, M.D., at p. 412 of the record before the New York Court of Appeals.

(ii) ***How the Federal Question was Raised and Adjudicated Below.***

Appellees moved to dismiss the negligence and products liability actions as barred by the applicable state statute of limitations, New York CPLR 214(5). The constitutional issue was briefed and orally argued before a motion term of the Supreme Court, Erie County. The issue was also presented, indirectly, in appellant's counsel's affidavit, paragraph 22, submitted in opposition to that motion.

The court indirectly ruled upon the constitutional claim in barring the negligence cause of action. In so ruling it relied in part upon the authority of *Schwartz* v. *Hayden Chemical Corp.*, 12 N.Y.2d 212, 237 N.Y.S.2d 714. New York Court of Appeals Chief Judge Desmond and Associate Judge Fuld had dissented in *Schwartz* upon the constitutional issue and cited this Court's decision in *Urie* v. *Thompson*, 337 U.S. 163 (1949), upon which appellant heavily relied.

The court denied appellees' motion as to the products liability action; thus there was no adjudication of the constitutional claim as to that cause of action. *See infra* at p. A-9 to A-16.

The same issue was briefed and argued orally before the Appellate Division of the Supreme Court. In a *per curiam* decision, the Appellate Division granted appellees' motions to bar the products liability action, thus rejecting appellant's constitutional claim against barring that cause of action. For support the Appellate Division also drew upon, in part, *Schwartz* v. *Hayden Chemical Corp.* *See infra* at p. A-7.

When the appeal was brought before the New York Court of Appeals, appellant reiterated her constitutional claims during oral argument and in her brief. In choosing to leave any change in CPLR 214(5) to the state legislature, the majority opinion made no specific reference to this claim, but merely stated — "We have considered plaintiff's other contentions and find them to be without merit." *See infra* at p. A-3.

Associate Judge Fuchsberg, however, wrote in dissent that the present application and interpretation of §214(5) is unconstitutional, citing the dissent in *Schwartz* that, " 'it would be unreasonable and perhaps unconstitutional to hold that time to sue expired before it was possible for plaintiff to learn of the wrong.' " *See infra* at p.A-5. And for further support he, too, drew upon this court's reasoning in *Urie* v. *Thompson*, 337 U.S. at 170, that any such interpretation given to a statute of limitations, as has been done here, cannot be reconciled with the traditional purposes of statutes of limitation.

And in granting appellant's subsequent motion to amend the remittitur, the New York Court of Appeals noted, "there was presented and necessarily passed upon a question under the constitution of the United States, ..." *See infra* at p.A-19.

THE QUESTION IS SUBSTANTIAL

The question presented is substantial because the interpretation given §214(5) by the New York Court of Appeals is in bold disregard of precedent after precedent by this Court establishing the minimum due process standards for all state statute of limitations and when applied in identical factual circumstances as presented by this appeal.

The question presented is substantial, then, first of all because it offers to this Court a real and direct conflict with an unbroken line of precedent in this Court.

Its substantial nature is further reflected in the noteworthy character of the question. Preeminent procedural authorities in New York have focused significant attention on this constitutional question. *See* 7B *McKinney's New York CPLR* §214, C214:6 at p.437, *Practice Commentary* by J. McLaughlin; Note, *Asbestos Litigation* 7 Fordham Urban L.J. 55, 77-83 (1978); Kelner, *Asbestos Litigation: An Update*, Vol.182 N.Y.L.J. No. 51, p.1, col.1 (Sept. 12, 1979); Note, 45 Albany L.Rev. 717 (1981).

And the unconstitutional character of such interpretations of statutes of limitations has captured the attention of bench and bar nationwide.[3] Motley, *The Causal Relation Discovery Rule* (constitutional attacks on statute of limitations), 1 J. of Products Liability 221, 229 (1977); Note, *Developments in the Law of Statutes of Limitation*, 63 Harv.L. Rev. 1177, 1200, 1203-07 (1963); Bruck, *The Armies of Asbestos*, The American Lawyer, November, 1979 at p.19; Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases*, 13 Forum 279, 282 (1977).

But the question presented is substantial not only in terms of content, however, but also in terms of the number of citizens in the State of New York, and elsewhere, who must suffer similar constitutional deprivations. There are thousands of asbestos insulation workers throughout New York State and not one of them has *ever* been able to timely file suit. And in view of the latent nature of the injury, thousands of New York asbestos workers exposed in the 1940's-60's will attempt suit in future years. Section 214(5) will not permit one of them inside the courthouse door. Their due process rights to have at least a reasonable, meaningful time within which to pursue their common law negligence actions are being wholly frustrated by the lower court's decision to sustain the constitutionality of §214(5) as presently interpreted and applied, notwithstanding the constitutional perimeters for state statutes of limitations previously established by this Court, discussed *infra*.

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[3]The issue of industry awareness and the hazards of asbestos exposure, and financial compensation for its victims, are of real and present concern to the public and the Congress. *See, Hearings on Asbestos Related Occupational Diseases Before A Subcommittee of the House Committee on Education and Labor*, 95th Cong. 2d Sess. 1-4, 52-128; *Library of Congress Congressional Research Services*, 96th Cong. 2d Sess., Report of Six Case Studies of Compensation for Toxic Substance Pollution (Comm. Print 1980); *The Magic Mineral*, New Yorker Magazine, October 12, 1968 at p. 117.

Full review and consideration by this court would resolve the issue not only for those thousands of New York citizens, but indeed for hundreds of thousands of asbestos workers in those few other states who,[4] like New York, have failed to satisfy their constitutional responsibility to fashion a statute of limitations rule that affords a reasonably diligent plaintiff realistic access to the courthouse door.

The due process deprivation here is twofold. First, the application given §214(5) in this factual context is at odds with the very *raison d'etre* for statutes of limitations, as this Court concluded under identical circumstances in *Urie* v. *Thompson*, 337 U.S. 163. If a rule is at odds with its very purpose, it is irrational and therefore unconstitutional.

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[4]*See e.g.*, *Neubauer* v. *Owens-Corning Fiberglass*, 504 F.Supp. 1210 (E.D. Wis. 1981) applying Wisconsin law; also see *Basshom* v. *Owens-Corning Fiberglass*, 327 F.Supp. 1007 (N.M. 1971). Nearly every other state, however, has satisfied its constitutional duty in framing rational and reasonable statutes of limitation for inherently unknowable injuries. *See Tyson* v. *Johns-Manville Corp*, 399 So.2d 263 (Ala Sup. C[illegible] 1981); *Velasquez* v. *Fiberboard Paper Products*, 97 Cal. App.3d 881, [illegible] Cal. Rptr. 113 (1st Dist. 1979); *Ricciuti* v. *Voltarc Tubes, Inc.*, 277 F.2[illegible]9 (2d Cir. 1960) (Conn.); *Layton* v. *Allen*, 246 A.2d 794 (Del. Super. Ct. 1968); *Fearson* v. *Johns-Manville Corp.*, 525 F.Supp. 671 (D.C. D.C. 1981); *Nolan* v. *Johns-Manville Corp.*, 85 Ill.2d 161, 421 N.E.2d 864 (1981); *Essex Wire Corp.* v. *M.H. Hilt Co.*, 263 F.2d 599 (7th Cir. 1959) (Ind.); Kan. Stat. Ann. §60-513 (1964); *Louisville Trust Co.* v. *Johns-Manville Corp.*, 580 S.W.2d 497 (1979); *R.J. Reynolds Tobacco Co.* v. *Hudson*, 314 F.2d 776 (5th Cir. 1963) (La.); *Marig* v. *Johns-Manville Corp.*, 284 Md. 70, 394 A.2d 299 (1978); *Karjala* v. *Johns-Mansville Corp.*, 523 F.2d 155 (8th Cir. 1975); *West* v. *Atlas Chemical Industries, Inc.*, 264 F.Supp. 697 (E.D. Mo. 1966); *Raymond* v. *Eli Lily Co.*, 412 F.Supp. 1392 (N.H. 1976), *aff'd* 556 F.2d 628 (2d Cir. 1976); *Williams* v. *Borden, Inc.*, 637 F.2d 731 (10th Cir. 1980) (Okl.); *Coyne* v. *Porter-Hayden Co.*, 428 A.2d 208 (Pa. Super. Ct. 1981); *Buckner* v. *GAF*, 495 F.Supp. 351 (E.D. Tenn. 1979); *Strickland* v. *Johns-Manville Corp.*, 461 F.Supp. 215 (C.S.D. Texas 1978); *Locke* v. *Johns-Manville Corp.*, 275 S.E.2d 900 (Va. Sup. Ct. 1981); *c.f. I.N.A.* v. *Forty-Eight Insulations, Inc.*, 451 F.Supp. 1230 (E.D. Mich. 1978).

Secondly, as this Court has repeatedly held, state statutes of limitation must provide the plaintiff with an adequate, *bona fide* opportunity to bring suit.

> It may be properly conceded that statutes of limitation *must* proceed on the idea that the party has full opportunity afforded him to try his right in the courts.

Wilson v. *Iseminger*, 185 U.S. 55, 62 (1901) (emphasis supplied). And again in *Canadian No. Ry. Co.* v. *Eggen*, 252 U.S. 553, 562 (1920) (emphasis added) the same principle was sounded:

> A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them *for a length of time reasonably sufficient to enable an ordinarily diligent man to initiate proceedings for their protection.*

The Court, "has often decided that statutes of limitation affecting existing rights are not unconstitutional, *if a reasonable time is given for the enforcement of the action before the bar takes effect.*" *Terry* v. *Anderson*, 95 U.S. 628, 633 (1877). Reasonableness is determined in view of the subject matter. *U.S.* v. *Morena*, 245 U.S. 392, 397 (1918). As Mr. Justice Harlan wrote in *Wheeler* v. *Jackson*, 137 U.S. 245, 255 (1890) (emphasis supplied):

> It is the settled doctrine of this Court that the legislature may describe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, *provided, in each case, a reasonable time, taking all the circumstances into consideration, be given . . . .*

Cf. Atchafalaya Land Company v. *F.B. Williams Cypress, Co.*, 258 U.S. 190 (1922).

All of the circumstances surrounding latent diseases like asbestosis and silicosis were taken into account by this Court in

Urie v. *Thompson*, 337 U.S. 163. The Court made it quite clear that these due process standards are not satisfied by a date of exposure/inhalation rule; that the date of inhalation or exposure rule in actions to recover for latent diseases does not afford the plaintiff, "a length of time reasonably sufficient to enable an ordinarily diligent man to initiate (his) proceedings . . . ." *Canadian No. Ry. Co.* v. *Eggen*, 252 U.S. at 562.

To embrace appellees' reasoning, this Court ruled, "would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this rule Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability." *Urie*, 337 U.S. at 169.

And although the Court in *Urie* was construing a statute of limitations under the Federal Employers' Liability Act, its decision rested not upon anything peculiar to that legislation, but upon the unfair consequences that would attach, "to blameless ignorance." *Id.*, at 170. Such consequences would be at odds with the traditional common law purposes behind statutes of repose:

> Nor do we think these consequences could be reconciled with the *traditional purposes of statutes of limitation*, which conventionally require the assertion of claims within a specified period of time after *notice* of the invasion of legal rights.

Id. (emphasis added).

Thus in *Urie* the Court borrowed language from a California Workers Compensation decision which, "seems to us applicable in every relevant particular . . . ." *Id.*

In the context of latent diseases, this plaintiff's injury is, " 'the product of a period of time rather than a point in time,' "

and that, " 'no specific date of contact with the substance can be charged with being the date of injury.' " *Id.*

The obvious result, then, for any statute of limitations, whether for common law actions or statutory programs which seek recovery for latent and inherently unknowable injuries is that, "the affected (plaintiff) can be held to be 'injured' only when the accumulated effects of the deleterious substances manifest themselves." *Urie*, 337 U.S. at 170 quoting *Associated Indemnity Corp.* v. *Industrial Accident Comm.*, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076.[5]

Early in this court's history it recognized the need for its intervention into the field of state statute of limitations where the statutory time provided, the manner of its application, or the definition of when such limitations begin, are so unreasonable as to amount to a denial of due process premised on essential notions of fairness.

> The time and manner of their operation, the exceptions to them, and the acts from which the time limit shall begin to run will generally depend on the sound discretion of the legislature, ... Cases may occur

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[5]There is no danger that the plaintiff will sleep on his rights, for he has no notice that his rights have been invaded until the latent disease first manifests itself. And as court after court has noted in adjudicating claims against the asbestos industry, there is no significant danger here that time has faded memories, evidence has been lost or witnesses have disappeared, as cautioned by the Court in *Order of R.R. Telegraphers* v. *R.E.A.*, 321 U.S. 342, 349 (1944). *See e.g.*, *Harig* v. *Johns-Manville Corp.*, 284 Md. 70, 394 A.2d 299, 302 (1978). The documents produced by discovery in nationwide litigation against this industry and by congressional investigations have provided adequate insurance against any such unfairness to these defendants. *See Hearings*, n.3, *supra*.

This appeal does not present the case where a plaintiff is ignorant of his legal right to commence an action, *see, e.g.*, *U.S.* v. *Kubrick*, 444 U.S. 111 (1979), but is, instead, the case of a plaintiff whose injury is unknowable until manifestation and where, "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Id.*, at 122.

> where the provisions of a law in those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court; . . . .

Jackson v. *Lamphire*, 28 U.S. (3 Pet.) 280, 290 (1830).

Therefore, plenary review should be given this direct defiance of Supreme Court precedent. New York's CPLR 214(5), as applied in the context of inherently unknowable injuries, must be realigned into conformity with constitutional precedent. It is important not only to this appellant, but to thousands like him accross the State of New York and, indeed, to many asbestos workers in other states which also have failed to meet their constitutional responsibilities. *See* n.4, *supra*.

Diversity among the states there must always be, especially in an area of traditional state concerns; but when a number of our states fail to accord its citizens their due process rights which have been firmly established by this Court in the form of general guidelines for fashioning rules for statutes of repose, there is then presented a serious and substantial issue soluble only by this Court.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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DATED: February 26, 1982